Decision **DRAFT DECISION OF ALJ WALKER (Mailed 12/4/02)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the San Francisco Airport's refusal to comply with California Public Utilities Code Section 99152 and General Order 164-B and order to show cause why the Airport should not be ordered to complete a system safety program plan prior to commencement of the Airport's operations of its AirTrain transportation system.	Investigation 02-07-014 (Filed July 17, 2002)

O P I N I O N

1. Summary

This Order concludes that the Commission has safety jurisdiction over the AirTrain people-mover system at San Francisco International Airport (SFO).

2. Procedural History

The Commission instituted this investigation and order to show cause into why SFO should not be ordered to complete a system safety program under Commission auspices before the start of operations of the AirTrain system. The AirTrain is an above-ground, automated system comprised of unmanned rubber-tired trolleys that will operate within a concrete guideway to serve terminals, parking areas and other points in the airport. It will replace a shuttle bus system that now carries passengers within the airport premises.

The show-cause order required SFO to present evidence and argument in support of its objection that the Commission lacks jurisdiction to conduct safety inspection and approval of the AirTrain system. The Rail Transit Safety Section of the Commission's Consumer Protection and Safety (Staff) Division asserts Commission jurisdiction pursuant to Pub. Util. Code § 99152.[1]

At a prehearing conference on August 7, 2002, the parties presented a stipulation by which SFO agreed to be bound by an interim system safety program prepared in conjunction with the Commission's rail transit safety engineers. In an Interim Opinion dated August 22, 2002, the Commission approved the stipulation. This investigation remained opened pending resolution of the jurisdictional question. On September 18, 2002, the parties filed a Joint Statement of Undisputed Facts, and SFO filed its opening brief. Staff responded on October 23, 2002, and SFO filed its rebuttal brief on November 6, 2002, at which time this matter was deemed submitted for Commission resolution.

3. Background, Scope of the Proceeding

The AirTrain will consist of a fleet of 38 vehicles that will serve nine stations along approximately three miles of dual guideways, with a capacity of 4,000 passengers per hour. There are two lines, the "Blue Line" running from the rental car center and the "Red Line," looping the terminals and providing a link to a new Bay Area Rapid Transit (BART) station. Like the current system of privately operated shuttle buses that the AirTrain will replace, the service will be provided at no charge to passengers. The system is wholly internal to the airport

[1] Unless otherwise noted, all section references are to the Public Utilities Code.

property and does not cross any public or private road. It is expected that AirTrain ultimately will carry more than 10 million passengers per year. SFO has contracted with Bombardier Transportation Systems to design, construct, operate and maintain the AirTrain.

During construction of the AirTrain system, SFO and its consultants worked with the Commission's rail safety engineers in developing safety procedures and guidelines. However, in June 2002, when Staff asserted that a system safety program would have to be developed and approved by the Commission pursuant to General Order (GO) 164-B, SFO declined on grounds that the Commission lacks jurisdiction to enforce such a requirement.

In a Scoping Memo dated August 13, 2002, Assigned Commissioner Geoffrey F. Brown defined the issues in this proceeding as follows:

a. Has SFO demonstrated that its AirTrain people-mover system is not subject to Commission jurisdiction pursuant to Pub. Util. Code § 99152?

b. Has SFO demonstrated that its AirTrain people-mover system is not subject to GO 164-B, GO 143-B, and GO 127?

The Scoping Memo concluded that a hearing would not be necessary, and the issues would be dealt with on brief.

4. Section 99152

Section 99152 is central to our analysis. It states as follows:

> Any public transit guideway planned, acquired, or constructed, on or after January 1, 1979, is subject to regulations of the Public Utilities Commission relating to safety appliances and procedures.
>
> The commission shall inspect all work done on those guideways and may make further additions or changes necessary for the purpose of safety to employees and the general public.

> The commission shall develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction and operation of those guideways. Existing industry standards shall be used where applicable.
>
> The commission shall enforce the provisions of this section.

Section 99152 was adopted by the Legislature in 1978. (Stats. 1978, c. 1142, p. 3509, § 1.) The third and fourth paragraphs of the statute were added by amendment in 1986. (Stats. 1986, c. 483, § 1.)

5. SFO's Case Against Jurisdiction

SFO maintains that safety regulation of the AirTrain is vested solely in the City and County of San Francisco. The City Charter provides that the Airport Commission "shall have charge of the construction, management, extension, operation, use and control of all property, as well as the real, personal and financial assets which are under the Commission's jurisdiction." (City Charter 4.115.) California Government Code § 50474 provides that "in connection with the erection, improvement, expansion, or maintenance of such airports or facilities, a local agency may…(f) Regulate the use of the airport and facilities and other property or means of transportation within or over the airport."

SFO acknowledges that the Commission has authority to regulate safety of public transit guideways pursuant to § 99152, but it argues that this authority is limited to transit districts or transit agencies like BART. SFO further maintains:

> Section 99152 is contained within Division 10 of the Public Utilities Code, which is entitled "Transit Districts." The term "transit" is defined numerous times within other parts of Division 10, as "the transportation of passengers only and their incidental baggage by means other than chartered bus, sightseeing bus, or any other motor vehicle not on an individual passenger farepaying basis." (See, *e.g.*,

> Public Utilities Code §§ 40005, 70005, 90005, 95005, and 98005.) In other words, "transit" as contemplated by the Public Utilities Code only includes transportation on a farepaying basis…. Because the AirTrain is an internal airport shuttle system that does not accept individual passenger fares, it is not "transit" within the meaning of the Public Utilities Code, and therefore cannot be considered a "public transit guideway." (SFO Opening Brief, at 9-10.)

As to Staff's contention that the AirTrain is a common carrier, SFO notes that § 211 defines "common carrier" as "every person and corporation providing transportation *for compensation* to or for the public or any portion thereof" (emphasis added). SFO states that AirTrain will not be providing transportation "for compensation" because service will be provided at no charge to SFO passengers, workers and tenants.

Similarly, SFO contends that the Commission's GO 164-B by its own terms is applicable only to "rail fixed guideway systems," not to AirTrain's rubber-tired vehicles that run on a concrete guideway. (GO 164-B, § 1.2.) By the same token, according to SFO, neither GO 127 nor GO 143-B can apply to the AirTrain because those general orders deal with railroads and light-rail guideways and not with rubber-tired vehicles that do not operate on rails.

SFO notes (and Staff concedes) that people-mover systems at other airports are regulated only by the airport authority or municipality in which they operate and are not subject to safety oversight by a state agency. These airports include Hartsfield International Airport (Atlanta), Dallas-Fort Worth International Airport, Denver International Airport, Chicago O'Hare International Airport, and Seattle-Tacoma International Airport.

6. Staff's Case for Commission Jurisdiction

Staff contends that the Legislature has delegated safety oversight of mass transit guideway systems to the Commission. It argues that, through § 99152, the

Commission is charged not only with the duty to "inspect all work done on those guideways" but also with the responsibility to develop an oversight safety program "to be met by operators in the design, construction, and operation of those guideways."

As to whether AirTrain is a "public transit guideway" under § 99152, Staff asserts that the definition of "transit" under various provisions of the Public Utilities Code is "the transportation of passengers and their incidental baggage by any means" (§§ 24505, 50005, 100012, 102012, 103012), and "the transportation of passengers only and their incidental baggage by means other than by chartered bus, sightseeing bus, taxi, or any other motor vehicle not on an individual passenger fare-paying basis and includes carpools and ridesharing in private vehicles" (§§ 30005, 40005, 70005, 90005, 95005, 98005). Staff contends that AirTrain provides transportation to passengers and their incidental baggage by means other than a chartered bus, sightseeing bus, or any other motor vehicle not on an individual passenger fare-paying basis, and so falls within each of these definitions.

While there is no definition of "public mass transit guideway" in the California Codes, Staff notes that the California Attorney General has applied a dictionary definition to the term "exclusive public mass transit guideways," stating that the phrase

> …is limited ("exclusive") to a publicly owned ("public") channel controlling the line of motion ("guideway") for conveyances ("transit") carrying large number of people ("mass"). (Cal. Ops. Cal. Atty. Gen. 119 (May 27, 1987).)

Since 1991, the Commission has defined "public transit guideway" as "A system of public transportation utilizing passenger vehicles that are physically

restricted from discretionary movement in a lateral direction." (GO 143-B, Section 2.11.)

Staff argues that the Commission since 1911 has been the state agency with authority over rail systems in California, and that the courts have held that the state's interest in public transportation is controlling and supersedes that of cities, counties and local governments. (*Civic Center Ass'n v. Railroad Com.* (1917) 175 Cal. 441.) Staff notes that the Commission, unlike other state agencies, derives much of its jurisdiction by direct grant from the California Constitution, as well as that delegated by the Legislature. Staff asserts that, in *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, the California Supreme Court reasoned that "forms of transportation unknown at the time the Constitution was adopted" (like public transit guideways) "are within the regulatory powers of the commission…" (42 Cal.2d at 641.)

7. Is AirTrain a 'Public Transit Guideway'?

If the AirTrain is a "public transit guideway," then the plain meaning of § 99152 is that the AirTrain is subject to safety oversight jurisdiction of this Commission. City Charter provisions that suggest otherwise cannot stand in the face of Article XII, § 8 of the California Constitution, which provides: "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."

SFO argues that § 99152 is applicable only to transit districts because the legislation falls within Division 10 of the Public Utilities Code entitled "Transit Districts." What SFO fails to point out is that § 99152 is contained in that division's Part 11, entitled "Provisions Applicable to All Public Transit," and Chapter 3, entitled "Miscellaneous." Section 99152 pointedly omits any reference to "transit districts" in its language.

We have dealt with this issue before. In *Brown v. Santa Clara County Transportation Agency* (1994) 56 CPUC2d 554, 55b, we stated:

> While PU Code Division 10 (which contains § 99152) is titled "Transit Districts," it is not limited to transit districts (e.g., it includes special benefit districts (§ 99101); nonfixed route operator, dial-a-ride, paratransit (§§ 99155 and 99155.5); public entity (§ 99160)). The treatment of these other entities is interspersed with statutes dealing with transit districts. Thus, Division 10 is not limited to transit districts.
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> Moreover, § 99152 is within Chapter 3 ("Miscellaneous"), Part 11 ("Provisions Applicable to All Public Transit") of Division 10. That is, the subject section covers miscellaneous aspects applicable to all public transit.

We conclude that the literal reading of the statute accurately reflects the Legislature's intent to include "[a]ny public transit guideway." We reject the notion that the Legislature intended the Commission to regulate guideways of public transit districts (the primary business of which is to safely transport millions of people) while not regulating guideways of an airport (the *ancillary* business of which is its new AirTrain), thereby exempting an inexperienced entity from Commission safety standards for a new unmanned guideway trolley system.

We also reject SFO's argument that because it does not charge a fare for use of AirTrain, § 99152 does not apply pursuant to the definitions of "transit" contained in §§ 40005, 70005, 90005 and 98005[2]. SFO's interpretation is

[2] Each of these definitions of "transit" is identical. For example, § 98005, applicable to the Santa Cruz Metropolitan Transit District, states as follows:

Footnote continued on next page

predicated on a reading of the language of those statutes that uses "fare-paying" to modify the word "transportation." We believe that a more reasonable reading would use "fare-paying" to modify the words "any other motor vehicle," presuming that the Legislature sought to exempt private cars but not taxis.

In any event, the interpretation of the language is irrelevant because the sections that use such language apply to transit *districts.* If one is to use language defining transit for the purposes of a district to interpret the applicability of § 99152, one can just as easily use §§ 24505, 50005, 100012, 102012, and 103012. Those provisions define "transit" as "the transportation of passengers and their incidental baggage *by any means."*[3] (Emphasis added.)

To reiterate, § 99152 does not apply just to *districts*; it applies to "[a]ny public transit guideway." "Fare-paying" is not a determinative factor because (1) it rests on a definition of "transit" applicable to some, but not all *public transit districts* (no one except the City and County of San Francisco is here suggesting that SFO needs to be defined as a public transit district, which it decidedly is not, for § 99152 to apply); (2) it rests on a strained interpretation of how "fare-paying" modifies the word "transportation" instead of "any other motor vehicle"; and (3) it presupposes that the Legislature wanted only those who pay to ride a

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> "Transit" means the transportation of passengers only and their incidental baggage by means other than by chartered bus, sightseeing bus, or any other motor vehicle not on an individual fare-paying basis. Nothing in this section shall be construed to prohibit the district from leasing its buses to private certified public carriers or to prohibit the district from providing school bus service for the transportation of pupils between their homes and schools.

[3] Section 103012, applicable to the San Mateo County Transit District, has a slightly different definition, stating that: "'Transit' or 'transit service' means the transportation of passengers and their incidental baggage and parcels by any means."

transit conveyance to be safe from negligent operators, something that even the most cynical observer of our Legislature would be reluctant to infer.

As Staff points out, the California Attorney General has defined "public transit guideway" in a manner that clearly includes the AirTrain. So has the Commission, both in GO 143-B, section 2.11, and in *Brown v. Santa Clara*, *supra*, 56 CPUC2d at 556 ("A system of public transportation utilizing passenger vehicles that are physically restricted from discretionary movement in a lateral direction"). Those definitions are consistent with that of the Federal Transit Administration:

> Fixed guideway system means a mass transportation facility which utilizes and occupies a separate right-of-way, or rail line, for the exclusive use of mass transportation and other high occupancy vehicles, or uses a fixed catenary system and a right of way usable by other forms of transportation. This includes, but is not limited to, rapid rail, light rail, commuter rail, *automated guideway transit, people movers*, ferry boat service and fixed-guideway facilities for buses (such as bus rapid transit) and other high occupancy vehicles. (49 CFR Part 611.5; emphasis added.)

The state's interest in the safety of public transportation is controlling and supersedes that of cities, counties and local governments. (*Civic Center Ass'n v. Railroad Com.* (1917) 175 Cal. 441.) The Legislature has declared that "the fostering, continuance, and development of public transportation systems are a matter of state concern." (§ 99220(b).) Section 99211 defines a public transportation system as "any system of an operator which provides transportation services to the general public by any vehicle which operates on land or water, regardless of whether operated separated from or in conjunction with other vehicles." The AirTrain clearly is a public transportation system, and

the safety regulation of such systems has been delegated by the Legislature to this Commission.

We conclude that the SFO AirTrain is, in the words of § 99152, a "public transit guideway planned, acquired, or constructed, on or after January 1, 1979," and that, therefore, it "is subject to regulations of the Public Utilities Commission relating to safety appliances and procedures." We further conclude that the Commission is required by the Legislature to inspect all work done on the

guideway, make additions or changes necessary for the purpose of safety, and provide safety oversight in the design, construction, and operation of the guideway.

8. Is AirTrain Subject to Regulation Under GO 164-B?

Having decided that the AirTrain is subject to the Commission's safety regulation under § 99152, we turn to SFO's contention that it cannot be bound by the requirements of GO 164-B.

GO 164 was adopted by the Commission on September 20, 1996, to implement the provisions of § 99152 and related federal regulations.[4] It was amended on September 3, 1997, and on December 2, 1999, and is currently the subject of further proposed amendments in Order Instituting Rulemaking (R.) 02-01-009.[5]

Under GO 164-B, operators of fixed guideway systems are required to prepare a system safety program plan that conforms to industry and Federal Transit Administration guidelines. The safety plan and any subsequent amendments must be submitted to the Commission for review and approval. Commission staff is authorized to inspect the design, construction and operation of the guideway system to assure compliance with safety and security procedures. At least once every three years, Commission staff is required to conduct an on-site review of the system's compliance with the safety program.

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[4] 49 USC 5330; 49 CFR Part 659 (Rail Fixed Guideway Systems, State Safety Oversight).

[5] "Order Instituting Rulemaking into the issues of safety certification for rail transit agencies and other public transit guideways."

The general order also requires an annual internal safety audit by the operator and sets requirements for investigating and reporting accidents and unacceptable hazardous conditions. In their Joint Statement of Undisputed Facts, SFO and Staff agreed that SFO shared some (but not all) information with staff in connection with a collision of empty AirTrain trolleys on August 5, 2002. While no one was injured in that collision, damage to the trolleys was extensive.

SFO argues that GO 164-B is applicable only to "rail" fixed guideway systems, not to fixed guideway systems that operate on rubber tires. We do not agree. The general order derives its authority from § 99152, which applies to "[a]ny public transit guideway planned, acquired, or constructed, on or after January 1, 1979." It is not surprising that GO 164-B focuses on rail fixed guideway systems since, at the time of adoption of these regulations, all public transit guideways in the state operated on rails.

Rule 2.6 of GO 164-B defines a "rail fixed guideway system" as one that is (a) under the Federal Transit Administration route mileage formula or receives federal funding, and (b) not regulated by the Federal Railroad Administration. SFO points out, correctly, that the AirTrain does not fit this definition because it is not part of the route mileage formula and does not receive federal funding.

Nevertheless, since § 99152 applies to any public transit guideway, and since § 99152 makes such guideways subject to the safety oversight program developed by the Commission, the safety requirements of GO 164-B (the safety oversight program) clearly are intended to apply to the AirTrain.

We take official notice that amendments to GO 164-B proposed by Staff in R.02-01-009 include a revised definition of a fixed guideway system to encompass "automated guideway transit system used for public transit" and to

eliminate the federal mileage and funding provision. Pending that revision, the Commission in our decision today orders SFO to comply with the safety rules

contained in GO 164-B under the general authority granted to us in § 99152.

We conclude that SFO in its operation of the AirTrain must develop a system safety program plan, perform the internal safety audit requirements, and investigate and report accidents and unacceptable hazardous conditions in the manner required by GO 164-B.

Finally, we dismiss as irrelevant SFO's suggestion that it should not be subject to the safety jurisdiction of the Commission because similar guideway systems in Atlanta, Chicago and other cities are not subject to state regulatory safety requirements. The California Legislature has concluded that the safety of certain mass transit systems is a matter of statewide concern as well as local concern, and it has historically required that the Commission's rail safety engineers inspect and monitor such systems. (*See, e.g.,* Pub. Util. Code § 99220; *City of San Mateo v. Railroad Com.* (1937) 9 Cal.2d 1.)

Because Staff in this proceeding seeks only to assert the requirements of § 99152 and GO 164-B, we find it unnecessary at this time to address the applicability to the AirTrain operations of GO 143-B (Safety Rules and Regulations Governing Light-Rail Transit) and GO 127 (Automatic Train Control Systems).

We rule as follows on the issues identified in Commissioner Brown's Scoping Memo for this proceeding:

1. SFO's AirTrain people-mover system is subject to the Commission's safety jurisdiction under § 99152, and SFO has failed to show a lack of jurisdiction by the Commission.

2. SFO's AirTrain system is subject to pertinent requirements of the oversight program (GO 164-B) developed to implement § 99152.

3. Because staff seeks only to assert the requirements of § 99152 and GO 164-B, we do not at this time address the requirements of GO 143-B and GO 127.

9. Comments on Draft Decision

The draft decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

10. Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Glen Walker is the assigned ALJ in this proceeding.

Findings of Fact

1. In Decision (D.) 02-08-072, the Commission approved a stipulation in which SFO agreed to be bound by an interim system safety program prepared in conjunction with Commission staff.

2. Pursuant to the stipulation, SFO will notify the rail transit safety staff that requirements of the stipulation have been met before implementing SFO's AirTrain operation.

3. The AirTrain is an above-ground, automated system comprised of 38 unmanned rubber-tired trolleys that will operate within a concrete guideway to service points within the airport.

4. The AirTrain will replace a shuttle bus system that now carries passengers within the airport premises.

5. It is expected that the AirTrain ultimately will carry more than 10 million passengers per year.

Conclusions of Law

1. The state's interest in public transportation supercedes that of cities, counties and local governments.

2. The Commission has safety jurisdiction over the AirTrain.

3. GO 164-B is the safety oversight program required by the Legislature in implementation of the Commission's safety responsibilities over public transit guideways.

4. The AirTrain should be ordered to comply with the safety requirements of GO 164-B.

5. It is unnecessary at this time to address the applicability to the AirTrain operations of GO 143-B and GO 127.

O R D E R

IT IS ORDERED that:

1. The Commission is required to exercise safety jurisdiction over the AirTrain people mover system at San Francisco International Airport (SFO) pursuant to Pub. Util. Code § 99152.

2. The objection of SFO to the safety jurisdiction of the Commission is overruled.

3. Prior to commencement of the AirTrain people-mover system, SFO is ordered to comply with safety oversight requirements set forth in General Order 164-B, pursuant to the Commission's general authority under Pub. Util. Code § 99152.

4. Investigation 02-07-014 is closed.

This order is effective today.

Dated _____, at San Francisco, California.